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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 821

UNITED STATES OF AMERICA, PETITIONER

v.

ANGLIN & STEVENSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on October 6, 1944, affirming the judgment of the United States District Court for the Eastern District of Oklahoma, determining the amount of attorneys' fees and expenses in proceedings to establish the heirship of the restricted estate of a deceased Indian of the Five Civilized Tribes and fixing a lien or charge upon the estate for the payment thereof.

OPINIONS BELOW

The District Court did not write an opinion. Its views are set forth in its findings of fact and

conclusions of law (R. 52–74). The opinion of the circuit court of appeals (R. 782–793) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 6, 1944 (R. 793). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a federal district court may charge the restricted distributive shares of Indian heirs of a full-blood member of the Five Civilized Tribes with the fees and expenses of attorneys representing those heirs in proceedings to determine heirs, combined with suits to quiet title, in which the United States has intervened after removal from state courts under Section 3 of the Act of April 12, 1926.

STATUTES INVOLVED

The material portions of Sections 1 and 9 of the Act of May 27, 1908, 35 Stat. 312, as amended; Section 3 of the Act of April 12, 1926, 44 Stat. 239, 240; and Sections 1 and 8 of the Act of January 27, 1933, 47 Stat. 777, are set forth in the appendix.

STATEMENT

Jackson Barnett, a full-blood Creek Indian of the Five Civilized Tribes, died on or about May

29, 1934, intestate and with no surviving immediate family. His estate consisted of real property in Oklahoma and California and funds and securities in the custody of the Secretary of the Interior representing the proceeds of oil and gas produced on the decedent's restricted allotment. The net value of the estate, according to the records of the Superintendent for the Five Civilized Tribes, was $1,235,724.72 (R. 52).

Upon Barnett's death, proceedings for the probate of his estate were begun in the County Court of Muskogee County, Oklahoma. (R. 52.) Two other actions in state district courts, one in Muskogee County, Oklahoma, and the other in McIntosh County, Oklahoma, to quiet title to certain lands included in the estate were also begun by claimants to the heirship of the estate. (R. 52–53.) Notices of the pendency of these proceedings were served upon the Superintendent for the Five Civilized Tribes, and they were removed to the federal District Court at the instance of the United States, all pursuant to the provisions of Section 3 of the Act of April 12, 1926, *infra*, pp. 22–24. There the three proceedings were consolidated. (R. 52–53.)

The United States, at the request of the Secretary of the Interior and as guardian of Barnett's restricted Indian heirs, filed a petition of intervention in the consolidated cause (R. 53). It alleged that Barnett's estate consisted of re-

stricted real and personal property; that the Secretary held in trust funds and securities belonging to the Barnett estate; that many persons were claiming to be Barnett's heirs; and that the United States was unable to determine who in fact were his heirs. It prayed that all claimants be required to appear and assert their claims or be forever barred and that the court determine Barnett's true heirs and distribute his estate. (R. 755–756, 759–765.) The probate proceedings were remanded (R. 784–785), but pursuant to the petition of intervention, an order was entered for publication of notice requiring claimants to appear in the proceeding to determine heirs or be forever barred, and such notice was duly published (R. 53).

Approximately 800 claimants in 50 different groups intervened in the consolidated cause, each group alleging that its members were nearest of kin to and the heirs of Jackson Barnett. The claimants in a group known as Group I employed Anglin & Stevenson and Stone, Moon & Stewart, law partnerships, to represent them in the proceedings, agreeing to pay them out of any recoveries fees ranging from 33⅓% to 40%. The claimants in a "Group II" similarly employed attorneys H. G. House, R. S. Cate, H. B. Parris, L. C. Lytle and George H. Jennings, provision being made for a contingent fee of 33⅓%. The attorneys for this group, with their clients' consent, also employed, on a contingent basis, Hayes,

Richardson, Shartel, Gilliland & Jordan, a law partnership, to assist in representing the group. The claimants composing a certain "Group III" likewise made an attorneys' contract with the law firm of Gibson, Maxey & Holleman and with attorneys Howell Parks and J. Garfield Buell, the stipulated contingent fee in this instance being 50%. Their clients being impecunious, the attorneys for the three groups agreed to advance the expenses of the litigation and the clients agreed to reimburse them out of any recoveries. (R. 53–55.) All claimants in these three groups were full-blood Creek Indians or the heirs of full-blood Creek Indians (R. 56).

Trial of the consolidated cause extended from July 16, 1934 to June 1940. (R. 57.) Prior to September 1937 the attorneys for each of the three above-mentioned groups represented separately the interests of their respective clients in the litigation and combatted the claims of all of the other numerous claimants. The three groups became convinced that they were all relatives of Barnett but were uncertain which of the groups was the nearest of kin. Because of this situation and because of the expense of combatting the claims of the 47 other groups of claimants, which none of the three groups was able to bear alone, they entered into a so-called contract of family settlement as of June 30, 1936. It was agreed that the three groups should unite their efforts,

cooperate in the prosecution of their respective claims and in their defense against the claims of other groups, and share expenses. It was further agreed that in the event any person or persons in any of the three groups should be adjudged the heir or heirs of Jackson Barnett, then the estate or proportion thereof awarded to such person or persons should be deemed to have been awarded to all claimants in the three groups and should be divided in the proportions of 50% to Group I, 25% to Group II, and 25% to Group III. (R. 58–59.) This contract was approved by the various county courts of Oklahoma having jurisdiction of the parties thereto who were minors or incompetents, by the county court of Muskogee County, Oklahoma, having jurisdiction of Barnett's estate, and, on September 2, 1937, by the Secretary of the Interior. (R. 58–59.)

In January 1940 the District Court filed its findings and conclusions that the members of Groups I, II and III were Barnett's nearest of kin and were entitled to inherit his estate. The decree also provided that as to such of the heirs as were restricted Indians the Secretary of the Interior should retain their respective shares in his custody for their use and benefit, "excepting such sum or sums as this court may allow, fix and determine as charges thereon and payable therefrom as costs, expenses, and attorney's fees in connection with this suit." (R. 61.) More than

350 adverse claimants appealed to the Circuit Court of Appeals (R. 61), where the judgment was affirmed. *Scott* v. *Beams,* 122 F. 2d 777 (C. C. A. 10). Certiorari was denied, 315 U. S. 809. Throughout the litigation the United States was neutral as between the various claimants. (R. 65–66.) The Secretary of the Interior approved the contract of family settlement without prejudice to the rights of the claimants who were not parties thereto (R. 64). In the appellate court the United States in a brief memorandum stated in substance that it was a stakeholder and was neutral as to the claimants (R. 66).

In supplementary proceedings, the attorneys for the successful claimants filed their petition for attorneys' fees and expenses (R. 3–16). The petition alleged the attorneys' employment by the successful claimants (R. 5–7), the services performed (R. 7–12), and the expenses incurred (R. 12–14). It also alleged (R. 14) that the United States upon the express request of the Secretary of the Interior had instituted the proceedings for the determination of Barnett's heirs and their distributive shares of his estate, and that—

> said Secretary of the Interior thereby invoked the jurisdiction of this court to adjudge and decree who were the heirs of Jackson Barnett and to decree the distribution of said estate, and this court thereby obtained jurisdiction of the res of said trust fund with power to determine the

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> beneficial ownership and to decree the distribution thereof, and to allow and order paid all reasonable costs and expenses, including attorneys' fees, necessary to the proper presentation and the correct determination of said matters and to the preservation of the rights of said heirs, and to make said costs and expenses, including attorneys' fees, a charge upon the said funds, and to order the same paid out of said funds.

The petition also recounted the inability of the attorneys' clients to bear the expenses of the litigation, the advancement of expenses by the attorneys, and the risk the attorneys took of

> uncompensated loss of several years of time and labor and the loss of all the money that they advanced and paid in the preparation and trial of said cause.

The petition further alleged that the attorneys should be allowed and paid their necessary expenses and "a fee equal to 33⅓% of the net value of said recoveries," and that such expenses and fees should be made a charge upon the funds and property recovered for the successful claimants (R. 14–17).

The United States filed a motion to dismiss the petition, alleging that the estate of Jackson Barnett was restricted and under the supervision and control of the Secretary of the Interior; that the Secretary had never relinquished or transferred

his authority to the court; and that therefore the court had no authority to administer the estate (as distinguished from determining the rightful heirs; see Section 1 of the Act of June 14, 1918, 40 Stat. 606, *infra*, pp. 21–22) and could not require payment therefrom of the attorneys' fees and expenses (R. 19–22). The petition came on for preliminary hearing (R. 91–235), during which the court overruled the Government's motion and granted it leave to plead over (R. 179, 235). Thereafter, the Government filed an answer and response to the petition, repeating the allegations of its motion to dismiss the petition (R. 23–37). The attorneys filed a reply (R. 40–51) alleging that the court had acquired jurisdiction to allow the fees and expenses out of the funds and properties involved by reason of the provisions of Section 3 of the Act of April 12, 1926, 44 Stat, 239 (*infra*, pp. 22–24), making provision for binding the United States to judgments in suits involving the restricted property of Indians of the Five Civilized Tribes, and because the United States had intervened and invoked the court's jurisdiction in the consolidated cause.

The petition for attorneys' fees and expenses came on for further hearing (R. 235–657). Thereafter, the court filed its findings of fact and conclusions of law (R. 52–74). The findings recited the history of the litigation and the extent of the participation therein of the attorneys and of the

United States. In particular the court found that the attorneys had attempted to negotiate an agreement with the Secretary of the Interior for the payment of their fees and expenses from the funds and property in his custody but that the Secretary had refused to negotiate unless they would dismiss their petition for attorneys' fees and expenses with prejudice (R. 69); that the attorneys had incurred expenses totalling $33,-111.43 which were reasonable and necessary (R. 67–68); and that a fee of 25% of the net value of Barnett's estate constituted reasonable compensation for their services (R. 69–70).

The court thereupon concluded in substance that by reason of the intervention of the United States the court acquired constructive possession and therefore jurisdiction of the estate; that the intervention of the United States was tantamount to a removal of restrictions so that the court might allow attorneys' fees and expenses from the estate; that the heirship proceedings were removed to the federal court in conformity with Section 3 of the Act of April 12, 1926 (*infra*, pp. 22–24), which provides that "the judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved"; that the United States being bound by the decree, the Secretary of the Interior as its agent was also bound; that the existence of restrictions on the

estate did not restrain courts of equity from applying rules which experience had shown to be essential to the adequate protection of the successful claimants; that the court had jurisdiction to fix attorneys' fees and expenses and make them a charge upon the estate; and that reasonable attorneys' fees were 25% of the net value of the estate and petitioners were also entitled to recover from the estate the amount of expenses found to have been reasonably and necessarily incurred by them. (R. 70–74.)

On June 23, 1943, the court entered its supplemental decree, in which it determined the amount of attorneys' fees at 25% of the net value of Jackson Barnett's estate and the amount of expenses at $33,561.63; made provision for the division of the fees and expenses among the successful attorneys; and provided that the fees and expenses should be a charge upon and recovered out of the portions of the estate recovered for the respective successful claimants. (R. 83–89.) The Circuit Court of Appeals affirmed (R. 793).

REASONS FOR GRANTING THE WRIT

1. In sanctioning a lien on restricted Indian property for the payment of attorneys' fees and expenses, the decision below conflicts with decisions of this Court such as *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *United States Fidelity Co.,* 309 U. S. 506; and *United States* v.

Hellard, 322 U. S. 363, which hold that neither the United States nor property in which it is interested may be subjected to suit except in conformity with sovereign consent. Such consent has, we believe, not been given with regard to the matter in question here.

The court below found a waiver of sovereign immunity in Section 3 of the Act of April 12, 1926, 44 Stat. 239 (*infra,* pp. 22–24), providing for judgments binding the United States in federal and state court suits in Oklahoma, involving Five Tribes' allotted lands or the proceeds thereof. The court held that by that Section the District Court was vested with full equitable jurisdiction over the lands and proceeds here involved, under the same principles as other property in cases of the same variety, notwithstanding the fact that this property is restricted by the Act of May 27, 1908, sec. 1 (*infra,* pp. 20–21, extended May 10, 1928, sec. 1, 45 Stat. 495); the Act of May 27, 1908, sec. 9, as amended April 12, 1926, (*infra,* p. 21, extended May 10, 1928, sec. 2, 45 Stat. 495); and the Act of January 27, 1933, sec. 1, (*infra,* pp. 24–25). The lien imposed by the court is, however, an invasion of the restrictions, which Section 3 of the 1926 Act evinces no purpose of Congress to permit. That Section simply provides a method of concluding the United States in litigation involving Five Tribes' allotted land or its proceeds, in order to achieve the objective of promoting sta-

bility of titles through singleness of litigation.[1] It does not empower the courts to remove restrictions or otherwise alter the substantive law applicable to the property involved in such suits. Hence the attempted liens are invalid. The statute is effective to preclude the United States, as well as other parties, from questioning the disposition of the property involved; but it does not warrant the conclusion that a charge may be levied upon the property without the consent of the Secretary of the Interior.

2. The Circuit Court of Appeals also held that consent by the Secretary to the trial court's exercise of full equitable powers over the property, justifying the award of attorneys' fees and the lien, was implicit in the United States' intervention and participation in the proceedings, as was the case in *United States* v. *Equitable Trust Co.*, 283 U. S. 738. There it was held that by intervening and participating in a suit by Barnett's next friend to recover funds which had been improperly released from the custody of the Secretary of the Interior, the United States had impliedly consented to the

[1] Section 3 of the 1926 Act was passed to offset, in the interest of security of titles, the effect of such decisions as *Privett* v. *United States*, 256 U. S. 201, under which the United States could bring suit with respect to Five Tribes' allotted lands notwithstanding earlier litigation to which it was not a party. The Section prevents "a new suit from being instituted for and on behalf of a restricted Indian thereafter by the Government." H. Rep. 322, 69th Cong., 1st sess., p. 2. See also S. Rep. 317, 69th Cong., 1st sess.

allowance of attorneys' fees and expenses from the funds which were recovered. The *Equitable Trust Co.* decision was based upon the previously announced doctrine that the United States' action in joining in a suit implies its "acceptance of whatever liability the courts may decide to be reasonably incident to that act." *United States* v. *The Thekla,* 266 U. S. 328, 341. Cf. *United States* v. *Shaw,* 309 U. S. 495, 502–503. This court deemed it reasonably incident to the United States' intervention in that suit that it submit to the "general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf" (283 U. S. 744). It held that the restrictions did not prevent this result because "we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust,* such as Barnett was shown to be" (id., p. 745).

In this case, unlike the *Equitable Trust Co.* case, there was no "wronged *cestui que trust,*" but, on the contrary, the United States throughout the proceedings fully discharged its trust obligations with respect to Barnett's estate. It intervened in order to aid the court to reach

a correct determination as to the heirs of Jackson Barnett, lending its personnel and investigative facilities for the purpose of discovering and investigating evidence to the end that the court might be protected from imposition and perjury.

The Barnett heirship proceedings have involved no recovery or preservation of trust property within the general rule of equity invoked in the *Equitable Trust Co.* case. Cf. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164–167; *New York Dock Co.* v. *Poznan*, 274 U. S. 117, 121; *Trustees* v. *Greenough*, 105 U. S. 527. The property here was not in need of recovery or preservation, but has remained at all relevant times in the control of the Secretary of the Interior. Act of May 27, 1908, secs. 1, 9, *infra*, pp. 20–21; Act of Jan. 27, 1933, sec. 1, *infra*, pp. 24–25. The attorneys' services were not rendered, nor were their expenses incurred, in behalf of the estate but solely in behalf of their clients.

No rule of equity permitted the allowance of compensation for these services or reimbursement for the attorneys' expenses from the estate as such. In interpleader proceedings, such as the Government's petition is said to have "initiated" here (R. 53, 63), the rule is to the contrary and counsel to a party interested in the fund are not entitled to an allowance of fees. *Groves* v. *Sentell*, 153 U. S. 465, 485–486; *Century Insurance Co.* v. *First National Bank*, 102 F. 2d 726 (C. C. A. 5),

certiorari denied, 308 U. S. 570; *Guardian Life Ins. Co.* v. *Rosenbaum,* 280 Fed. 861 (C. C. A. 3). The rule is the same in respect to the administration of estates. *In re Hamilton's Estate,* 96 Mont. 551, 33 P. 2d 258 (1934), and authorities cited. *In re Schwint's Estate,* 183 Okla. 439, 83 P. 2d 161 (1938), does not hold otherwise, for there property was recovered for the estate.

Whether and to what extent the fees and expenses should be paid from the shares of Barnett's estate recovered by the successful claimants was a matter between attorneys and clients—clients who in this case were not free to contract unaided with reference to the property in question. *House* v. *United States,* 144 F. 2d 555, 561 (C. C. A. 10). Nothing in the present proceedings themselves lends sanction to the departure from the principles above stated, which is involved in the holding of the court below that the attorneys' fees and expenses were properly allowed as a charge upon the property. The Government's petition in intervention (R. 755–757), it is true, prayed that the court "distribute the estate" to the rightful heirs of Jackson Barnet. This language, however, cannot be taken to confer jurisdiction upon the court by consent with respect to the fees or to surrender the non-delegable duty of the Secretary of the Interior with reference to the property in question. See *United States* v. *Griffin,* 303 U. S. 226, 229; *Mott* v. *United States,*

283 U. S. 747, 751; *United States* v. *Ferry County,* 24 F. Supp. 399 (E. D. Wash.). The matter of fees, consequently, remains to be adjusted between the attorneys, their clients, and the Secretary as the official with statutory jurisdiction over the property of Indian wards.

3. The decision below is at variance with the requirement that the Secretary of the Interior approve attorneys' fees and expenses to be paid from the restricted funds of Indians of the Five Civilized Tribes, which follows from Section 1 of the Act of January 27, 1933 (*infra,* pp. 24–25) and has been administratively observed. Cohen, *Handbook of Federal Indian Law* (1942) pp. 444–446. If the decision below should stand, attorneys whose fees and expenses are made payable from restricted funds by court order will be relieved of this requirement. The problem is of great importance in the administration of the property of members of the Five Tribes. On its face, Section 3 of the Act of April 12, 1926, confers full authority upon state courts as well as federal, once the requisite notice of suit has been served upon the Superintendent of the Tribes and the United States has appeared or the statutory period has elapsed. At present the United States frequently does not deem it necessary to appear; but it would become necessary for it to do so in numerous additional cases in which attorneys' fees payable out of the property of

Indian wards (accompanied by liens which might necessitate the sale of property) might eventuate. In every such case the court would be substituted for the Secretary of the Interior as the protector of the Indians' interests.

The court below, it is true, did not base its decision wholly upon the words of the Act of 1926 but relied, in addition, upon the full equitable powers of the District Court to which the proceedings were removed. These were invoked, it was held, by the Government's intervening petition. The federal courts, however, have no independent powers with respect to the administration of estates or the determination of heirship incidental to such administration (*Caesar* v. *Burgess,* 103 F. 2d 503, 506 (C. C. A. 10)), although actions to quiet title may at times involve entire estates consisting of realty. Estates, as such, do not come under the control of federal courts. The powers of the District Court here stemmed solely from Section 3 of the Act of April 12, 1926 and from those of the Oklahoma courts from which the several consolidated actions were removed. These include no authority to allow counsel fees to a claimant to heirship.[2] See *supra,* pp. 15–16. Any equitable

[2] The only power of an Oklahoma county court with respect to the restricted property of heirs of an estate administered by it are bestowed by Section 9 of the Act of May 27, 1908, *infra*, p. 21, which authorizes the court to approve conveyances of allotted lands by such heirs.

power to allow counsel fees that may have resulted from the two suits to quiet title (*supra*, p. 3) are necessarily limited to the property involved in those suits. The District Court's action was not so limited. It therefore exceeded both its own powers and those of the State courts.

CONCLUSION

For the foregoing reasons, and particularly because of the importance of the question involved in the administration of the restricted property of members of the Five Civilized Tribes, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JANUARY 6, 1945

APPENDIX

The material portion of Section 1 of the Act of May 27, 1908, 35 Stat. 312, is:

> That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, or said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half-Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty one,* except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and

*The restrictions were extended to April 26, 1956, by Section 1 of the Act of May 10, 1928, 45 Stat. 495.

regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *

The material part of Section 9 of the Act of May 27, 1908, *supra,* as amended April 12, 1926, 44 Stat. 239, is:

> The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * *

Section 1 of the Act of June 14, 1918, 40 Stat. 606, reads as follows:

> That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided,* That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: *Provided further,* That where the time limited by the laws of said State for the institu-

tion of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: *Provided further,* That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

Section 3 of the Act of April 12, 1926, 44 Stat. 239, 240 reads as follows:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indians are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and

profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as

herein specified: *Provided,* That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

The material portion of Section 1 of the Act of January 27, 1933, 47 Stat. 777, is:

> That all funds and other securities now held by or which may hereafter come under

> the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: *Provided*, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law * * *

Section 8 of the Act of January 27, 1933, *supra*, reads as follows:

> SEC. 8. That it shall be the duty of the attorneys * provided for under the Act of May 27, 1908 (35 Stat. L. 312), to appear and represent any restricted member of the Five Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court

*Denominated Special Representatives in the Act of May 27, 1908, and commonly referred to as Probate Attorneys. See Cohen, *Handbook of Federal Indian Law*, p. 446.

thereof, in any matter in which said restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any county court approving the sale of any interest in land, to the district court of the district to which the county is a part.

U. S. GOVERNMENT PRINTING OFFICE: 1949

(7)

Office - Supreme Court, U. S.
FILED
FEB 2 1945
CHARLES ELMORE CROPLEY
CLERK

No. 821

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, *Petitioner,*

VERSUS

ANGLIN & STEVENSON, *ET AL., Respondents.*

Response to Petition for Writ of Certiorari

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PRESS OF THE STAR PRINTERY, MUSKOGEE, OKLA.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 821

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ANGLIN & STEVENSON, *ET AL., Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Statement.

Supplementing the Petitioner's statement, Respondents call attention to the following facts:

In the original case the United States expressly consented and requested that the court should try all the issues, both main and ancillary, including the issues as to attorneys' fees and the expense of litigation. On July 18, 1938, in their requests for findings and conclusions, Respondents requested the court to find and adjudge

> "that their [the clients'] respective shares in said estate, *excepting such sums as this court may fix or allow as charges thereon because of or in connection with this suit*, should be held by the Secretary of the Interior and disbursed under his supervision for the use and benefit of said distributees * * *." (R. 743.)

On the following day petitioner expressly adopted all the requested findings and conclusions made in behalf of the distributees. The United States, through the District Attorney and his assistants, participated in the preparation of the requested findings and conclusions, and reported the

fact to the Department of Justice (R. 743, 551, 476-7). The court made findings and conclusions substantially as requested (R. 52, *et seq.)*. Paragraph 5 of the judgment in the main case (R. 749) provided that the portions of the estate awarded to each distributee, "*excepting such sum or sums as this court may allow, fix and determine as charges thereon and payable therefrom as costs, expenses and attorneys' fees incurred in connection with this suit,*" should be held by and disbursed under the supervision of the Secretary of the Interior for the use and benefit of the restricted distributees.

In Paragraph 7 of the judgment (R. 750) the court reserved jurisdiction to determine in a subsequent proceeding all incidental or ancillary matters for carrying out the provisions of the judgment.

The United States Attorney, through his assistants, helped to prepare the judgment and joined in asking for its entry, promptly reporting those facts to the Department of Justice (R. 551). The United States was satisfied with the judgment and did not appeal from it. On May 28, 1942, after Respondents had filed their petition for allowance of attorneys' fees and expenses, the United States made its first objection to the court's exercise of its jurisdiction which the government had invoked (R. 19-22).

The court's findings (R. 52, *et seq.)* set forth the facts with respect to the ignorance and helplessness of Respondents' clients, the intelligence of their many adversaries, the skill and ability of opposing counsel, the necessity for the employment of able and experienced attorneys to represent the claimants finally adjudged to be the owners of the properties, the extraordinary hazards involved, the unusual difficulties of the litigation which required the attorneys for the successful claimants to prepare for and try

during the long years of their service some forty-four lawsuits in one, and as to which one of the able attorneys for some of the adversaries testified: "In the beginning and until the court decided it I believed it was anybody's lawsuit; that Jackson Barnett was so old that the witnesses were so hard to find who could testify as to his origin, who in fact his blood relatives were, that it might be anyone's lawsuit until it was determined." (R. 297).

Other important facts are stated hereinafter at places in the brief deemed most convenient for the Court's consideration.

The petition for Writ of Certiorari should be denied because no cause is shown for the issuance of the Writ.

The decision attacked is entirely sound and fully supported by decisions of this Court.

1. The United States filed a petition in the nature of an original bill in its own behalf and in behalf of all parties to this cause who were restricted Indians, and thereby invoked the full and complete equity powers of the court. This is a right the sovereign has exercised always when its relations to its Indian wards are involved or their rights affected. *This sovereign right did not arise from the Act of April 12, 1926; nor does it depend in any measure upon that Act.* In *Heckman* v. *United States*, 224 U. S. 413-448, 56 L. ed. 820, it was held that such representation of Indian wards by the United States is complete; that out of the government's peculiar relations to Indians sprang the obligation to protect them, together with the power to do so; that the government recognizes no limitations which are inconsistent with its discharge of the national duty. To the same effect is an unbroken line of this Court's decisions.

It is well settled that where there is removal of a state court case to the Federal Court, followed by the filing of petition of intervention by the United States upon behalf of its Indian wards, such intervention is in the nature of an *original bill*, with the result that there are no limitations whatsoever upon the court's jurisdiction of the character asserted in the petition for writ of certiorari. *United States* v. *Mid-Continent Petroleum Co.* (C. C. A. 10), 67 F. (2d) 37, certiorari denied, *Hosey* v. *Mid-Continent Petroleum Corp.*, 290 U. S. 702, 54 S. Ct. 346, 78 L. ed. 603.

The case of *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379, was commenced on January 22, 1925, and decided by this Court June 1, 1931. Jurisdiction to allow attorneys' fees and costs was sustained in circumstances substantially the same as here involved, and wholly without any reference to the Act of April 12, 1926, 44 Stat. 240.

It is entirely clear that the Federal District Court's jurisdiction, arising from the government's own bill, was unaffected by the jurisdictional limitations of either of the state court cases which were consolidated with the government's suit.

The several actions consolidated in one case are *in rem*. *Kline* v. *Burke*, 260 U. S. 226, 67 L. ed. 226. There it was said of such action, "The effect is to draw to the Federal Court the possession or control, actual or potential, of the *res*." The situation is the same as if the Secretary of the Interior, or other governmental agency, had brought all of the property into the district court and placed same in its registry, and had asked that court to try the issues between the various contending claimants, decree to whom the property belonged, and distribute same to the true owners. The United States was stakeholder of the properties. The gov-

ernment alone could furnish and did provide the most suitable forum for determination of the heirs, the distribution of the estate, and all matters incident thereto.

2. Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 240, *enlarged the jurisdiction of federal courts over removed state court cases of this class.* It authorizes the removal of causes coming within the orbit of its provisions, even though other independent grounds for federal jurisdiction are not present. The general removal statute, limiting the Federal Court's jurisdiction to matters pleaded in the state courts, has no application in such case as this. *Caesar* v. *Burgess* (C.C.A. 10), 103 F. (2d) 503; *United States* v. *Fixico* (C.C.A. 10), 115 F. (2d) 389.

The government's theory of limited jurisdiction gives no meaning to the following provisions of the Act. Referring to the federal court's jurisdiction after removal, it is provided, "and such court is hereby given jurisdiction to hear and determine said suit." It is further provided, "and the cause shall then proceed in the same manner as if it had been originally commenced in said district court." And it is further provided that "the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved." The first quoted provision clearly disposes of the contention that the jurisdiction of the district court is limited to the jurisdiction of the courts from which removal was had. The second quoted provision makes it clear that the jurisdiction of the district court is the same as if the removed cases had been commenced in the Federal Court. The third quoted provision removes from this case any question with respect to restrictions against alienation.

In *Caesar* v. *Burgess*, 103 F. (2d) 503-506 (C.C.A. 10), referring to these provisions, it was held that by these pro-

visions the United States yielded its exclusive jurisdiction of its restricted Indian wards to the extent necessary for final disposition of matters of this kind in the Federal District Court.

In *United States* v. *Fixico, supra*, it was held that the jurisdictional provisions of said Section 3 of the Act of April 12, 1926, are broader in scope than those of the general removal statute, and it was stated, "It must be presumed that the Congress chose that broad language with deliberation and studied purpose."

The government's erroneous theory of limited jurisdiction, if sustained and applied, would deprive the Federal District Court of jurisdiction to hear and determine the state district court cases removed to the Federal Court and consolidated with the government's action. Consider, for instance, the McIntosh County district court case. It was to recover and quiet the title to restricted lands left by Barnett, the same having been purchased with restricted funds and made expressly subject to restrictions. Had it not been removed, and had it gone to final judgment in the state district court, the findings and judgment of the state court would have been conclusive as to all the parties to the action (the parties being the same as those in this case), and the findings with respect to the heirship and the rule there established would have operated as conclusive in all subsequent litigation with respect to the same matters that were adjudged in the state court. Everything was done in that case to bind everybody. The heirs and all adverse claimants within the jurisdiction of the court were personally served. Due notice by publication was given to all possible adverse claimants. If it were true, as now claimed by the government, that the Federal District Court had only the limited jurisdiction of a county court, the Federal Court

had no right whatever to adjudge the issues presented in the McIntosh County district court case.

Refutation of the government's theory as to jurisdiction is found in its own pleadings. In fact the record shows that the government's theory of jurisdiction was precisely the same as Respondents' theory until after the original Jackson Barnett case was affirmed by the Circuit Court of Appeals.

3. Recent decisions of this Court, *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379, and *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 83 L. ed. 1184, fully and clearly settled the jurisdictional question in favor of Respondents. Petitioner erroneously treats this question as still unsettled. This erroneous contention is offered as the sole ground for issuance of the writ.

In the *Equitable Trust Company* case it was shown that Barnett was an incompetent and that he needed help to establish his right to the property. These elements are here in much larger measure. Barnett did have the very active help of the United States. Its attorneys vigorously defended his cause. But in the instant case the government remained neutral and impartial throughout the entire period of the litigation, and this neutrality continued for years after the government's attorneys knew that many of the claims, very difficult to meet, were false and wholly fabricated. This was admitted by the United States in its response to the petition for allowance of attorneys' fees and expenses. In paragraph IV of said response this admission appears thus: "The United States alleges that during the trial of this case, and as a result of investigations made by solicitors, agents, and representatives of the United States, it was discovered that many of the claims presented by claimants herein were unfounded and spurious. The United

States, at all times throughout this litigation, constantly maintained a neutral and impartial position as to the claims of the various claimants." (R. 31). This neutrality prevailed in the case of Bennie Scott, a Mexican who never had the slightest connection, by blood, by record, or otherwise, with any Indian tribe. The government prosecuted him successfully and had him sent to a federal penitentiary because of his criminal effort to win the estate. *Scott* v. *U. S.*, 115 F. (2d) 137, certiorari denied, 312 U. S. 678. And the government was neutral as to the Bertha Barnett group, full-blood negroes who did not have any Indian blood and who were never connected with any Indian tribe, by record or otherwise. This false claim was supported by an immense amount of perjury, subornation of perjury, and conspiracy to defraud. While making ready to indict these negro claimants for their crimes—and this was done—the United States was still neutral in the civil case. The court found, as to these negroes, that their claims were clearly fictitious and spurious (R. 716).

In the circumstances presented in the *Equitable Trust Company* case the allowances of attorneys' fees and expenses to the litigation were permitted upon two grounds: *First*, because a court of equity, under its power and duty to do equity in accordance with the circumstances of a particular case, will allow successful attorneys fees and expenses out of funds recovered or preserved in the litigation, and *second*, on the further ground that the United States by its attorneys, at least impliedly, agreed that the court should make the allowances.

The need of Respondents' clients for attorneys was far greater than that of Jackson Barnett. In the *Equitable Trust Company* case only two points—one of fact and the other of law—were involved. Neither presented any serious question. Here the hazards arising from the facts

were most serious, and the questions of law were many and very serious. This is shown by the record. One of these Respondents was thoroughly familiar with both cases. He had been employed by the American Baptist Home Mission Society, a defendant in the *Equitable Trust Company* case. He testified (R. 318) that he was prepared to say from personal knowledge of the two cases that there was one hundred times more labor and effort expended by the attorneys in the instant case than by the successful attorneys in the *Equitable Trust Company* case. There was no denial of this fact. It cannot be denied. See findings of fact by the trial court in the supplemental proceedings for fees (R. 52, *et seq.*). In the *Equitable Trust Company* case the consent of the United States to the allowance was perhaps merely by implication, whilst here the consent was in writing and most explicit.

Petitioner erroneously contends that these properties were not in need of preservation or recovery because same were in the custody of the Secretary of the Interior. This is too short a view. To "recover" means to obtain by course in court; to succeed at a trial; *to establish the title* of the true owners, as against other claimants to the property. *Clinchfield Coal Corp.* v. *Steinman*, 213 Fed. (C. C. A. [Va.]) 557, 567; *Gawtry* v. *Adams*, 10 Mo. App. 29; *Hoover* v. *Clark's Admrs.*, 7 N. C. 169, 171; *Keiny* v. *Ingraham*, 66 Barb. (N.Y.) 250; *Pearler* v. *City of Mt. Vernon*, 158 Ill. App. 610; *Norton* v. *Winter*, 1 Ore. 47, 48; *Leslie* v. *York*, 112 Ky. 712, 66 S. W. 751. To the same effect are the definitions of the word "recovery" appearing in all the available standard dictionaries—Black's, Webster's International, Kinney's, Bouvier's, Anderson's, Burrill's. The word "preserve", applied to property rights, means to act timely and effectively; to guard, to shield and protect the right, especially by final decree of the court *declaring the right*. *Reino* v. *Mont. Min-*

eral Land Development Co., 38 Mont. 291, 99 Pac. 853, 855. See also dictionary definitions of the word "preserve".

A property is preserved and recovered by the establishment of the right thereto by court decree, though none of the parties to the litigation have the actual possession of the res.

We contend that the United States ought not to be heard to say that the properties were not in need of preservation, since it clearly appears that Respondents' clients were in desperate need of legal services to prevent an adjudication that their properties belonged to false claimants, and the government committed the matter to Respondents. It is true that Respondents' clients had no worry as to the safekeeping of the properties. Their distress lay in the fact that their right to the property was in grave danger of being lost by a judgment of the court.

In support of the petition for writ of certiorari it is claimed that the court was foreclosed from making the allowances to the attorneys because the properties were restricted. But this contention is squarely overruled in the *Equitable Trust Company* case, where it was said:

> "Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions.
>
> "We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose

and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity, when dealing with situations like that disclosed in this litigation, from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* such as Barnett was shown to be."

The above quoted holding was made without reference to Section 3 of the Act of April 12, 1926, which expressly lifted the restrictions, in so far as necessary for the proper functioning of the court.

Here the United States, as custodian of the *res*, submitted it to the orders of the court and then proceeded to give published notice to all adverse claimants who were not personally served, in order for the court to acquire jurisdiction to enter a final judgment determining the ownership of the properties and directing distribution, which would be binding upon all the world. But for the successful services of the Respondents their clients would have lost their right to the properties, together with their right to actual possession. Clearly Respondents both preserved and recovered the properties involved.

In *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 83 L. ed. 1184, there was involved a petition for the allowance of attorneys' fees and litigation expenses, to be charged against funds in the actual possession and control of the Comptroller of the Currency, held by a receiver appointed by and accountable to the Comptroller. The court's control over the funds was merely potential and constructive, rather than actual. The original suit was not for a class, nor to establish by litigation an available fund. In that proceeding Lottie Sprague established her own right to a lien upon

funds held by the receiver. In the supplemental proceeding she based her claim for attorneys' fees and expenses "upon the theory that she had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own." It was held that, in appropriate situations, allowance of counsel fees and other expenses entailed by litigation not included in the ordinary taxable costs recognized by statutes, is within the equity jurisdiction of the Federal courts. And it was further held that the suits in equity of which Federal courts have been given cognizance by the Judiciary Acts constitute, subject to modifications by Congress, that body of remedies, procedures and practices which, prior to the Declaration of Independence, had been evolved in the English Court of Chancery. The court discussed and applied these rules as follows:

> "To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest, while in others his litigation results in a fund for a group, though he did not profess to be their representative. The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis*, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.
>
> "That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of

granting reimbursement for the costs of litigation other than the conventional taxable costs is a part of the original authority of the chancellor to do equity in a particular situation."

The doctrine of the *Equitable Trust Company* and *Sprague* cases is a reaffirmation of the principles announced in *Ex parte Plitt*, Fed. Cas. No. 11,228, decided in 1853. This old case was so ably written that it became quite famous. It has been quoted and followed many times, and nowhere do we find, after diligent search, any decision to the contrary. That case arose upon the application of the representative of Daniel Webster, deceased, *et al.*, for fees and expenses for services rendered in an action to determine the heirs and for the distribution of the estate of one Aspden. It appears that the property involved was in the actual possession of the administrator, who was a party to the suit, but his possession was not adverse. No point whatever was made about the actual possession of the property, and it was held that Mr. Webster was entitled to recover his fees and expenses. In the court's statement of the case it was held:

> "The rightful claimant is perhaps the poorest of all, and wholly unable to show his right. Will the court give the fund to any claimant able to make a prima facie case? Or will it make some effort to ascertain the rightful party? It wishes to inform itself; and unless the cost of information is paid by the fund, it will be paid by nobody, and the court will not be rightly informed at all."

And in the opinion it was stated:

> "We have no doubt of the power of the court, where a fund is within its control, as in the case before us, to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees."

The doctrine of *Ex parte Plitt* was followed and approved in *Trustees* v. *Greenough*, 15 Otto. 527, 26 L. ed. 1157, and in *Swift* v. *Jackson* (C. C. A. 10), 37 F. (2d) 237.

The rule for which Respondents contend operates regardless of the actual possession of the property involved. It is immaterial whether the estate is held by an administrator, an executor, a trustee, *or any other party*. *Harrison* v. *Moncravie* (C. C. A. 8), 264 Fed. 776.

In *Wallace* v. *Fiske*, 80 F. (2d) 897, the court said:

> "It is next contended in defense that appellant brought no fund into court for remaindermen which could be subjected to the demands of counsel for contribution or otherwise; because, it is pointed out, the property representing the *res* 'was at all times in being, on hand and protected in a place for safe-keeping for the benefit of those interested therein', that is to say, the stock certificates and securities were locked in safe deposit vaults in the city of St. Louis. This contention of appellees seems to beg the question in this respect. This property was in the possession and control of the trustees who rejected the claim of Ehrhardt W. Franz, denied that he had any interest remaining, and refused to give him any information respecting that property and the administration of their trust."

The United States cannot render its Indian wards powerless to protect themselves in litigation. Here they had no resources other than the properties involved. Denial of their right to finance their litigation by the only means available to them would have left them and their counsel helpless and in a *cul de sac*.

4. The Petitioner's cited cases appearing in the petition at pages 11 and 12 are not in point. They are clearly distinguishable from the instant case.

The case of *Minnesota* v. *United States*, 305 U. S. 382, 83 L. ed. 235, was commenced in the state court without making the United States a party. Then there was a purported removal to the Federal Court, but the United States did not become a party in the Federal Court, except to move to dismiss. It was held that the United States was an indispensable party; that the state court did not acquire jurisdiction, and that therefore upon removal to the Federal Court under the general removal statute, the Federal Court had no jurisdiction.

In the case of *United States* v. *Shaw*, 309 U. S. 495, an effort was made to maintain a counterclaim or cross-petition against the United States. It was held this could not be done for want of statutory authority.

In *United States* v. *United States Fidelity Co.*, 309 U. S. 506, the same principle as that involved in the *Shaw* case was applied to a cross-action against the Choctaw and Chickasaw tribes, wards of the United States.

The case of *United States* v. *Hellard*, 322 U. S. 363, followed the Minnesota case, and held void, for want of jurisdiction, a proceeding concerning restricted Indians, in which the United States had not been made a party.

In each of these cases the absence of the United States was the fatal fact.

The cited statement from Cohen's Handbook of Federal Indian Law is unsupported by any authority and is refuted completely by the *Equitable Trust Company* case, discussed *supra*. The other cases cited by Petitioner in support of its theory of limited jurisdiction are clearly so far afield that we deem discussion of them unnecessary.

5. When the United States appears in court to assert a claim it so far takes the position of a private suitor as to agree that justice may be done with regard to the subject matter and all parties concerned in the litigation. Hence in the instant case the United States is bound by the same principles and rules applicable to a private person, and is estopped by conduct and by judgment from now asserting that the court did not have the right to make the allowances.

—*Folk* v. *United States*, 233 F. 191-192;
Luckenbach S. S. Co. v. *Norwegian Barque Thekla*, 266 U. S. 328, 69 L. ed. 313;
United States v. *Debell* (C. C. A. 8), 227 Fed. 775.

The United States had the power to advocate the cause of Respondents' clients. The government having committed their cause to private counsel, stood by for years and saw the Respondents preserve and recover the properties for the true owners. The government, by its authorized representatives, asked the court to make the allowances. The Respondents relied upon the assurances given by the government's own representatives. The United States, when so appearing, should be held to the same standards of fairness and consistency always required of private persons.

6. The authority of the Federal Court to make the allowances complained about was exclusive, regardless of what power the Secretary of the Interior might have had but for the pendency of the government's action.

To say that the Secretary of the Interior had the exclusive authority to make the allowances would be to say that the Secretary, if he so desire, may defeat the court's exercise of its jurisdiction, and defeat the right of Indians to have protection of counsel. We find no statutory authority for the claims made upon behalf of the Secretary. He is a mere

agent of the United States and a trustee in such matter. When the United States submitted the matter to the court, that submission was complete and necessarily exclusive.

It is well settled that in matters of this kind the trial judge is the most suitable person in the world to make such allowances. Even if the Secretary had the power to make these allowances, it would be impractical in the instant case for him to do so. The Congress never intended that he should make allowances in cases of this character. In the circumstances here presented the allowances properly belong within the judicial rather than the administrative field.

Respectfully submitted,

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